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STATE DEVELOPMENT CORPORATION OF PENANG v. COLLECTOR OF STAMP DUTY, MALAYSIA

HIGH COURT MALAYA, SUNGAI PETANI
CHAN JIT LI J
[ORIGINATING SUMMONS NO: KB-24NCVC-97-12-2018]
21 JANUARY 2022

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Abstract – *In determining whether or not an instrument is a 'security' for the purpose of the Stamp Act 1949, the court should enquire whether the instrument is an encumbrance on the property with which the lender could rely on to enforce and to recover the sum loaned under the credit facility. If the answer is in the affirmative, the instrument is then a 'security' and, if the answer is in the negative, that instrument could not amount to a security under the Act and, accordingly, the taxpayer is entitled to a remission under the Stamp Duty (Remission) (No. 2) Order 2012.*

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BANKING: *Islamic banking – Credit facilities – Security – Bank and corporation executed facility agreement – Corporation applied for remission of stamp duty on facility agreement – Application rejected by Collector of Stamp Duty – Whether letter of undertaking issued by State Government to Minister of Finance, in compliance to letter of approval to corporation, amounted to security under para. 2 of Stamp Duty (Remission) (No. 2) Order 2012 – Whether corporation entitled to remission*

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The plaintiff was established under the Penang Development Corporation Enactment 1971 and, accordingly, was obliged to comply with the statutory requirements under para. 14(1)(d) of the Second Schedule of the Incorporation (State Legislatures Competency) Act 1962. The plaintiff wrote to the Ministry of Finance ('MOF') for approval for the credit facilities under a facility. The MOF granted the approval subject to several conditions. Towards complying with the conditions in the MOF's letter, the State Government granted the plaintiff the required approval and, through the State Treasury, issued a letter of undertaking ('LOU'). As it transpired, the plaintiff accepted an offer by Bank Islam Malaysia Berhad ('bank') of credit facilities in the form of a loan for RM100 million and, subsequently, the parties executed the *Tawarruq* facility agreement ('facility'). The plaintiff then applied to the defendant for a remission of stamp duty on this agreement, pursuant to the Stamp Duty (Remission) (No. 2) Order 2012 ('Order'), based on the following grounds: (i) the facility was a financing or loan without security; (ii) the repayment of the facility was by a single bullet repayment; and (iii) the duty payable on the facility fell under item 22(1)(b) of the First Schedule to the Stamp Act 1949 ('Act'). The application was rejected by the defendant and the plaintiff was unsuccessful in its appeal. The

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defendant issued the stamp duty assessment notice (*ad valorem* duty) which required the plaintiff to pay RM500,020 as stamp duty on the facility. The plaintiff paid the said sum under protest and proceeded to file the present appeal. The issue that arose for adjudication was whether the LOU amounted to a security under para. 2 of the Order.

Held (allowing appeal with costs):

(1) The letter in dispute was a LOU, or a letter of assurance issued by the State Government to the MOF in compliance to the latter's letter of approval to the plaintiff. The court was unable to see how the bank could rely on this LOU to secure a repayment of the loan as there was no privity of contract between the bank and the State Government and/or the MOF. The LOU could not amount to a security for the purpose of the Act. (para 17)

Case(s) referred to:

Koperasi Serbaguna Kebangsaan Bhd v. Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur [2003] 8 CLJ 223 HC ***(refd)***

Muhibbah Engineering (M) Bhd v. Pemungut Duti Setem [2017] 10 CLJ 66 CA ***(refd)***

Legislation referred to:

Incorporation (State Legislatures Competency) Act 1962, Second Schedule para 14(1)(d)

Stamp Act 1949 (Revised 1989), ss. 38A(1), (5), 39(1), First Schedule Item 22(1)(b)

Stamp Duty (Remission) (No. 2) Order 2012, para. 2

For the plaintiff - Quah Boon Nee, Mohd Farid Azahari & Yasmin Maisarah Mohd Amin; M/s JB Lim & Assocs

For the defendant - Mohd Rizuan Othman & Mohd Asyraf Zakaria; LHDN, Cyberjaya

Reported by Najib Tamby

JUDGMENT

Chan Jit Li J:

[1] This is an appeal by the Penang State Development Corporation ("PDC") pursuant to s. 39(1) of the Stamp Act 1949 (Revised 1989). The sole issue to be determined is whether or not the Penang State Government's letter of undertaking dated 9 August 2019 amounts to a security under para. 2 of the Stamp Duty (Remission) (No. 2) Order 2012 ("the remission order").

[2] The background facts leading to this appeal are undisputed. PDC had accepted an offer by Bank Islam Malaysia Berhad ("Bank Islam") of credit facilities in the form of a loan for RM100 million. Following the acceptance, the parties executed a facility agreement called '*Tawarruq* Facility Agreement' ("the facility") on 1 September 2020.

[3] On the very same day, PDC applied to the collector of stamp duty ("the collector") for a remission of stamp duty on this agreement. The application for remission was made under the Stamp Duty (Remission) (No. 2) Order 2012. Paragraph 2 of the remission order provides as follows:

> Remission.
>
> 2. The amount of stamp duty that is chargeable under sub-sub item 22(1)(b) of the First Schedule to the Act upon a loan agreement or loan instrument without security for any sum or sums of money repayable on demand or in single bullet repayment under that sub-sub item which is in excess of zero point one percent (0.1%) is remitted.

Sub-sub item 22(1)(b) of the First Schedule states as follows:

> 22 Bond, Covenant, Loan, Services, Equipment Lease Agreement Or Instrument of any kind whatsoever: (1) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any sum secured by a duly stamped instrument, nor rent reserved by a lease or tack: (a) for a definite and certain period so that the total amount to be ultimately payable can be ascertained. The same *ad valorem* duty as a charge or mortgage for such total amount. (b) for the term of life or any other indefinite period for every RM100 and also for any fractional part of RM100 of the annuity or sum periodically payable RM1.00.

This application was, however, rejected by the collector.

[4] Messrs JB Lim & Associates, acting for PDC, appealed to the collector on 2 September 2020 for a review of the assessment as provided under s. 38A(1) of the Stamp Act 1949 which reads as follows:

> Notice of objection.
>
> s. 38A (1) Any person who is dissatisfied with an assessment or additional assessment of the Collector under this Part may, by written notice (referred to in this Act as "notice of objection"), object to the assessment or additional assessment and apply to the Collector to review the assessment or additional assessment.

The remission of the stamp duty was sought on the following grounds:

(i) that the facility is a financing or loan without security;

(ii) that the repayment of the facility is by a single bullet repayment; and

(iii) that the duty payable on the facility falls under Item 22(1)(b) of the First Schedule of the Stamp Act 1949.

[5] The collector remained unconvinced and dismissed the objection and upheld the assessment notice. Pursuant to s. 38A(5) of the Stamp Act 1949, the collector informed PDC of its decision. The collector also issued the

stamp duty assessment notice (*ad valorem* duty) of 24 September 2020 which required PDC to pay RM500,020 as stamp duty on the facility. PDC paid the sum in full under protest.

[6] Dissatisfied with decision of the collector, PDC, pursuant to s. 39 of the Stamp Act, through its solicitors appealed to the High Court seeking the following reliefs:

> (1) bahawa defendan diarahkan untuk menyatakan dan menandatangani satu kes yang menyatakan soalan-soalan di mana pendapatnya diperlukan dan keputusan yang dibuat olehnya;
>
> (2) bahawa Surat Tawaran daripada Bank Islam Malaysia Berhad [No. Syarikat: 198301002944 (98127-X)](Bank Islam) kepada Perbadanan Pembangunan Pulau Pinang (Plaintif) bertarikh 6 Mei 2019 dan Tawarruq Facility Agreement di antara Bank Islam dan Plaintif bertarikh 1 September 2020 (Perjanjian Pembiayaan Tawarruq) layak untuk mendapat peremitan amaun duti setem melebihi 0.1% di bawah Perintah Duti Setem (Peremitan)(No. 2) 2012 bagi kemudahan pembiayaan sebanyak RM100,000,000.00;
>
> (3) bahawa sekiranya Perjanjian Pembiayaan Tawarruq layak untuk menuntut peremitan di bawah Perintah Duti Setem (Peremitan)(No.2) 2012, duti setem yang telah terlebih bayar atas Perjanjian Pembiayaan bagi kemudahan pembiayaan sebanyak RM100,000,000.00 dikembalikan/ dibayar balik oleh Defendan kepada Plaintif;
>
> (4) bahawa rayuan Plaintif di bawah Seksyen 39 Akta Setem 1949 dibenarkan; bahawa kos-kos untuk rayuan ini dibayar oleh Defendan kepada Plaintif; dan
>
> (5) relif selanjutnya dan/atau relif lain sebagaimana Mahkamah Yang Mulia ini fikirkan berpadanan.

Section 39 of the Stamp Act 1949 provides as follows:

> Appeal to the High Court.
>
> s. 39.(1) Any person who is dissatisfied with the decision of the Collector under subsection 38A(5) may, within twenty-one days after the person is notified in writing of that decision and upon payment of duty in conformity therewith, appeal against the decision to the High Court by filing a notice of appeal with the High Court and may for that purpose require the Collector to state and sign a case, setting forth the question upon which his opinion was required, and the decision made by him.

[7] For the collector, the facility is a secured facility by virtue of a letter of undertaking issued by the Penang State Government ("State Government") to the Ministry of Finance and copied to the PDC. The learned Senior Federal Counsel, appearing for the collector, submits that this letter was issued as a security requirement under the facility. The clause providing for this requirement appears in the facility as follows:

Others [to specify if any]:

(1) Letter of Undertaking from Penang State Government *via* Jabatan Kewangan Negeri to Ministry of Finance that the State Government is to be accountable for the Facility of RM100,000,000.00 with the Bank.

[8] For ease of reference, the letter of undertaking is reproduced below:

Ruj. Kami : JKNPP/09/02/9
Tarikh : 9 Ogos 2019
8 Zulhijjah 1440H

Ketua Setiausaha Perbendaharaan
Kementerian Kewangan Malaysia
Bahagian Pengurusan Strategik Badan Berkanun
Aras 4, Blok Tengah
Kompleks Kementerian Kewangan
No. 5, Persiaran Perdana, Presint 2
62594 PUTRAJAYA

(u.p: Encik Mohd Sakeri bin Abdul Kadir)

Tuan

Surat Akujanji Ke Atas Permohonan Mengenai Kemudahan Pinjaman Kredit Tidar Berjumlah RM100 Juta Dari Bank Islam Malaysia Bhd Oleh Perbadanan Pembangunan Pulau Pinang (PDC)

Dengan segala hormatnya saya merujuk kepada perkara di atas.

2. Adalah dimaklumkan bahawa Kerajaan Negeri Pulau Pinang, melalui Majlis Mesyuarat Kerajaan Negeri (MMK) Bilangan 20/2019 pada 5 Julai 2019 yang disahkan pada 12 Julai 2019 telah bersetuju meluluskan cadangan mengenai Kemudahan Pembiayaan Kredit Tidar berjumlah RM100 Juta daripada Bank Islam Malaysia Bhd oleh Perbadanan Pembangunan Pulau Pinang (PDC).

3. **Sehubungan itu, Kerajaan Negeri memberi akujanji untuk bertanggungjawab sepenuhnya ke atas Pinjaman Kredit Tidar berjumlah RM100 Juta daripada Bank Islam Malaysia Bhd. tersebut**.

Sekian, terima kasih.

"Cekap, Akauntabiliti, Telus"
"Berkhidmat Untuk Negara"

Saya yang menjalankan amanah

(Dato' Sarul Bahiyah Binti Haji Abu)
Pegawai Kewangan Negeri
Pulau Pinang

s.k. Pengurus Besar
Perbadanan Pembangunan Pulau Pinang
No. 1 Persiaran Mahsuri
Bandar Bayan Baru
11909 Pulau Pinang

(emphasis added)

[9] En Quah Boon Nee ("En Quah"), learned counsel for PDC submits that it is evident that the facility was an unsecured facility as Bank Islam's letter of offer had stated 'NIL' under the item 'security'. He further submits that this letter cannot amount to a 'security' within the meaning of the Stamp Act 1949 as it was a letter issued to the Ministry of Finance pursuant to the requirements under para. 14(1)(d) of the Second Schedule of the Incorporation (State Legislatures Competency) Act 1962.

[10] Paragraph 14 (1)(d) of the Second Schedule of the Incorporation (State Legislatures Competency) Act 1962 provides as follows:

> **Investment and borrowing**
>
> 14(1) No corporation shall, without the prior written consent of the Minister of Finance unless he gives a general or specific direction on the matter:
>
> (a) establish or promote the establishment or expansion of companies or other bodies to carry on activities either under the control or partial control of the corporation itself or independently;
>
> (b) give financial assistance to any company, other statutory authority, any body or person by the taking up of shares or debentures or by way of any loan, advance, grant or otherwise;
>
> (c) purchase, underwrite or otherwise acquire any stock and shares in any public or private company; or
>
> (d) borrow money or enter into any guarantee involving financial liability.

[11] As PDC had been established under the Penang Development Corporation Enactment 1971, PDC was obliged to comply with the statutory requirement under para. 14(1)(d) above. Accordingly, PDC wrote to the Ministry of Finance for approval for the credit facilities under the facility. The Ministry of Finance granted the approval subject to several conditions as contained in the following letter:

> MOF.SBM(S)600-41/30/44(9)
>
> 22 Januari 2020
>
> Y. Bhg. Dato' Mohd. Bazid bin Abd. Kahar
> Pengurus Besar
> Perbadanan Pembangunan Pulau Pinang
> Bangunan Tun Dr. Lim Chong Eu
> No. 1 Persiaran Mahsuri, Bandar Bayan Baru
> 11909 Bayan Lepas
> Pulau Pinang
>
> Y. Bhg. Dato'
>
> Permohonan Kelulusan Kementerian Kewangan Malaysia Untuk Kemudahan Pinjaman Kredit Tidar PDC Dengan Bank Islam Malaysia Bhd Berjumlah RM100.0 Juta

A Saya dengan hormatnya diarah merujuk surat Y. Bhg. Dato' bertarikh 1 Ogos 2019 berhubung perkara tersebut di atas.

2. Selaras dengan peruntukan di bawah Perenggan 14(1)(d), Jadual Kedua, Akta Pemerbadanan (Kekompetenan Badan Perundangan Negeri) 1962 [Akta 380], dimaklumkan bahawa YB Menteri Kewangan bersetuju
B MELULUSKAN permohonan Perbadanan Pembangunan Pulau Pinang (PDC) untuk mendapatkan kemudahan pinjaman kredit tidar Islamik (Islamic revolving credit) daripada Bank Islam Malaysia Berhad (BIMB) berjumlah RM100.0 juta bagi tujuan pusingan modal kerja PDC.

3. Walau bagaimanapun, kelulusan di atas adalah tertakluk kepada
C pematuhan SYARAT-SYARAT berikut:

(i) Kelulusan ini adalah berdasarkan kelulusan Lembaga Pengarah PDC melalui Mesyuarat Lembaga PDC yang ke 4/2019 pada 7 Mei 2019 serta terma dan syarat-syarat yang terkandung dalam surat tawaran BIMB bertarikh 6 Mei 2019;

D (ii) Bagi tujuan modal pusingan, pihak pengurusan PDC adalah bertanggungjawab untuk memastikan kemudahan fasiliti perbankan oleh BIMB hanya digunakan apabila benar-benar diperlukan mengikut keperluan sebenar aliran tunai PDC;

(iii) Pihak pengurusan dan Lembaga Pengarah PDC bertanggungjawab
E memastikan prestasi kewangan kumpulan PDC ditingkatkan secara berterusan dan berkemampuan untuk membayar balik keseluruhan jumlah prinsipal dan keuntungan serta kos-kos berkaitan pembiayaan oleh BIMB serta pinjaman-pinjaman lain; dan

(iv) Kelulusan ini hendaklah tidak membawa sebarang implikasi perundangan dan kewangan kepada PDC dan Kerajaan
F Persekutuan.

Sekian, terima kasih

Saya yang menjalankan amanah

(Mohd Sakeri Bin Abdul Kadir)
G Setiausaha Bahagian Pengurusan Strategik Badan Berkanun
b.p Ketua Setiausaha Perbendaharaan
Kementerian Kewangan Malaysia

[12] Towards complying with the conditions contained in the Ministry of Finance's letter, the State Government in its State Executive Council's
H Meeting of 20/2019 granted PDC the required approval. Thereafter, the State Government through the State Treasury issued the letter of undertaking of 9 August 2019 which is now the subject of dispute.

[13] The taxpayer shoulders the burden of establishing that a remission should be allowed. (*Koperasi Serbaguna Kebangsaan Bhd v. Pemungut Duti*
I *Setem, Wilayah Persekutuan, Kuala Lumpur* [2003] 8 CLJ 223 affirmed by the Court of Appeal followed) in the instant case, it is incumbent on PDC to

show that the State Government's letter of undertaking is not a 'security'. There is, however, no definition of the term 'security' in the Stamp Act. Therefore, what is a 'security' for the purpose of the Stamp Act?

[14] In *Muhibbah Engineering (M) Bhd v. Pemungut Duti Setem* [2017] 10 CLJ 66, Muhibbah Engineering (M) Bhd ("Muhibbah") had executed an agreement with Maybank Islamic Berhad ("Maybank") to secure credit facilities. Muhibbah had given Maybank a negative pledge in the following terms:

> Now In Consideration Of The Foregoing, We Hereby Covenant And Undertake that so long as any part of the facility, profit, dividend, income, yield and any other fees, commission, cost or other charges relating thereto and any monies secured herein shall remain outstanding, we shall NOT without your written consent:
>
> (a) create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set-off or any other security interest on the whole or any part of our present or future assets other than:
>
> (i) liens arising in the ordinary course of business or by operation of law; and
>
> (ii) security interests existing at the date hereof provided the same has been disclosed to you prior to the date hereof and subject to the amount outstanding and secured thereby at all times and at any time hereafter not exceeding the amount so disclosed at the date hereof ...

[15] The High Court had decided in favour of the collector who had rejected Muhibbah's application for remission and imposed the stamp duty. On appeal, Abdul Rahman Sebli JCA (as he then was), delivering the judgment of the Court of Appeal, held that the negative pledge by its terms did not amount to a 'security' for the purpose of the Stamp Act. In the words of the learned judge (at p. 85):

> [60] Coming back to the word "security", *Lexis Nexis publication of Words, Phrases and Maxims – Legally and Judicially Defined* (vol. 13) defines it to mean as follows:
>
> A security is an encumbrance, vested in a creditor, **over the property of his debtor**, for the purpose of securing the repayment of a debt. It is **a right in the property of another**, which enables a person, who is entitled to receive a definite value from that another in default of so receiving it, **to realise it from that property**. The purpose of a security is to ensure, of [*sic*] facilitate, the fulfilment, or enjoyment, of some other right vested in its owner. Securities may be classified into:
>
> (i) mortgages;

A (ii) pawns;

(iii) floating charges;

(iv) lien.

This word has a variety of meaning:

B (i) the general name for all mortgages, charges, debentures, etc, whereby repayment of money is assured or secured;

(ii) any document by which any claim may be enforced.

(emphasis added)

C [61] Going by this definition, the negative pledge by the appellant is certainly not a security as it is not an encumbrance vested in Maybank over the properties of the appellant, nor does it vest in Maybank a right over the properties which enables Maybank to realise the loan amount from the properties in the event of default by the appellant. Being a mere pledge not to encumber properties and nothing more, there is no property D for the respondent to realise in the event of default.

[62] The true legal effect of the negative pledge given by the appellant is that it merely created an obligation not to encumber. It does not provide an obligation to repay any sum or sums of money in any way whatsoever. This is to be contrasted with that of a charge, mortgage or guarantee. In E these instruments, upon the occurrence of an event of default, the sums of money become due and payable and failure to pay will expose the assets encumbered to foreclosure proceedings to redeem the loan sums.

[63] We agree with learned counsel for the appellant that in the event of default by the appellant, Maybank will be considered as an unsecured F creditor and will be equal in right of payment *ie*, *pari passu vis-a-vis* the other creditors. It is therefore incorrect for the learned judge to hold the view that the negative pledge by the appellant assured or guaranteed Maybank of payment in the event of default.

[64] It is an undisputed fact that the appellant did not pledge any tangible asset or property as security that can be disposed of, sold or converted G to cash to pay for the facility. The learned judge however did not consider this as negativing the element of "security" in the facility agreement …

[16] In my view, based on the authority of Muhibbah, it is safe to conclude that in determining whether or not an instrument is a 'security' for the purpose of the Stamp Act, the court should enquire whether the instrument H is an encumbrance on property with which the lender can rely on to enforce and to recover the sum loaned under credit facility. If the answer is in the affirmative, then that instrument is a 'security'. Conversely, if the answer is in the negative, that instrument cannot amount to a security under the Stamp Act and, accordingly, the taxpayer is entitled to a remission under the I remission order.

[17] In the case before me, the letter in dispute was a letter of undertaking, or to use a more appropriate word a letter of assurance issued by the State Government to the Ministry of Finance in compliance to the latter's letter of approval to PDC. I am unable to see how Bank Islam can rely on this letter of undertaking to secure a repayment of the loan as there is no privity of contract between Bank Islam and the State Government and/or the Ministry of Finance. The letter of undertaking, therefore, cannot amount to a security for the purpose of the Stamp Act.

[18] Accordingly, the appeal and the reliefs sought by PDC should be allowed with costs.